No. 12339

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN C. EDWARDS, JR.,

Petitioner-Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent-Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF PLEADINGS AND FACTS

Appellant on May 25, 1949 lodged with the Clerk of the United States District Court for the Western District of Washington, Southern Division, his petition for a writ of habeas corpus (Tr. 3 - 8), and therewith filed an affidavit in forma pauperis (Tr. 1 - 2),

whereupon the District Court on June 2, 1949, directed the application to be filed and ordered appellee to show cause in the matter by filing a return to the petition and attaching thereto a certified copy of the information, plea and judgment as material to the issue, the appellant having failed so to do in connection with his petition. (Tr. 9 - 10).

To the order to show cause, appellee filed a return and attached thereto the documents as theretofore required. (Tr. 11 - 17).

Thereafter on June 24, 1949, pursuant to notice of motion served on appellant on June 21, 1949 (Tr. 20), the appellant filed his traverse to the return made by appellee. (Tr. 18 - 19).

On August 1, 1949, upon motion to dismiss, noted and served by appellee, (Tr. 21 - 23), the court made and entered an order denying appellant's petition for writ of habeas corpus, and dismissing the action. (Tr. 24 - 25). From that final order, the appellant has been permitted to appeal in forma pauperis. (Tr. 26 - 31).

The facts material to a determination of appellant's right to relief, as disclosed in the record, may be summarized as follows:

On March 26, 1947, an Information containing

two counts was filed against appellant in the Northern Division of the United States District Court for the Northern District of California, which information in the first count charged the defendant with transporting a stolen motor vehicle from Houston, Texas, to Sacramento, California, on or about March 16, 1947, and in the second count charged the defendant with transporting on or about March 16, 1947, in interstate commerce securities of the approximate value of $22,625.00, which on or about February 22, 1947, at Houston, Texas, had been stolen, and with knowing the same to have been stolen. (Tr. 14).

Thereafter, on April 16, 1947, the appellant having waived his right to assistance of counsel, and entered a plea of guilty thereto, he was adjudged guilty and convicted, and was sentenced to two years on the first count and six years on the second count, said periods of imprisonment so imposed to commence and run consecutively. (Tr. 15).

QUESTIONS PRESENTED

1. May not offenses under the National Motor Vehicle Theft Act and the National Stolen Property Act, be charged respectively in separate counts of the same information?

2. Can a person sentenced under such an in-

formation be released on habeas corpus on the ground, if it be so determined, that distinct offenses were improperly joined?

ARGUMENT AND AUTHORITIES

The pertinent portions of the statutes defining the offenses charged in the information, in the order of the counts, are as follows:

National Motor Vehicle Theft Act

"* * * Whoever shall transport or cause to be transported in interstate commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000 or by imprisonment of not more than five years, or both."

Title 18, U.S.C.A., Section 408.

National Stolen Property Act

"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, * * * knowing the same to have been so stolen, * * * shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: * * *"

Title 18, U.S.C.A., Section 415.

The pertinent portion of the Rule covering joinder of offenses, effective May 21, 1946, and applicable in this instance, is as follows:

"Two or more offenses may be charged in the

> same indictment or information in a separate count for each offense if the offense charged, whether felonies or misdemeanors, or both are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Rule 8, par. (a), Federal Rules of Criminal Procedure, following Sec. 687, Title 18, U.S.C.A.

1. *Offenses charged in information may be properly joined.*

It is true that Section 419, Title 18, U.S.C.A. provided:

> "Nothing in Sections 413 - 418 of this title shall be construed to repeal, modify, or amend any part of Section 408 of this title, cited as the 'National Motor Vehicle Theft Act'."

However, appellee does not agree that it was for the reasons assigned by appellant, to create distinct offenses, but, more likely, it was to overcome the prospective contentions that Section 415, being the later enactment, had replaced Section 408, and for such reason only the transportation of cars of $5,000.00 value or higher was intended to be prohibited.

Appellant finds support for his contentions in the case of *U. S. ex rel Valotta v. Ashe*, 2 Fed. (2d) 735, a habeas corpus matter decided by the District Court of the Western District of Pennsylvania, November 17, 1924.

While appellee does not desire to elaborate upon the advancement in criminal procedure, as disclosed by the above cited Rule 8, since the year of 1924 and the law then in effect, it should be pointed out that the Valotta case was concerned with actual trial before a jury for two murders, and it was held, in the language of headnote 5:

> "The trial of one for two felonies at the same time and before the same jury was a denial of due process of law, notwithstanding accused made no objection, and judgments of conviction were null and void."

Two indictments charging murder were found against Valotta and a single trial was had thereon.

In the instant case, the appellant plead guilty to an information containing two counts. Appellant, however, has failed to explain how being charged with two offenses was prejudicial in the face of his plea of guilty, so that it could be said that there was a denial of due process.

Again in the case of *McElroy v. United States*, 164 U.S. 76, a matter in error to the Circuit Court of the United States for the Western District of Arkansas to review a judgment of conviction of the plaintiffs in error, on the trial of several indictments consolidated, which were for distinct offenses at different times, the Supreme Court reversed the lower court

and remanded the cause with directions for a new trial, and for further proceedings.

However, it should be observed that in that case the Supreme Court discussed a similar situation as presented in the instant case which involved the facts in *Pointer v. United States*, 151 U.S. 396, where, as here, the unity of time, place and action rendered the proof the same as to both, and made the two alleged murders in that case substantially parts of the same transaction so much so that it was apparent to the Supreme Court that the substantial rights of the accused were not prejudiced by the action of the trial court, and the Supreme Court declined to reverse on the grounds of error therein. This part of the decision in the McElroy case apparently was not considered by the Pennsylvania court in arriving at its decision in the Valotta case, supra.

Appellant in his efforts to establish misjoinder seeks to separate the transaction involved in the second count from its relationship with the first count. If appellant had entertained any doubt as to the relationship of the two counts, he would at the proper time have been entitled to ask for a bill of particulars.

See *Myles v. United States*, 170 F. (2d) 443.

But appellant having plead guilty to transportation of securities of a value of $5,000.00 in interstate

commerce on the day mentioned also in the first count, his plea admitted all these material facts, and the same is not open to review in these proceedings.

See *Caldwell v. Hunter*, 163 F. (2d) 181;
Tilghman v. Hunter, 167 F. (2d) 661;
Dalton v. Hunter, 174, F. (2d) 633;
Hawkins v. Sanford, 53 F. Supp. 988.

Whether tested by Rule 8 or the decisions of the Supreme Court, there appears to be no misjoinder of counts in the instant case.

See *Pointer v. United States*, supra;
Kotteakos v. United States, 328 U.S. 750, 772 - 775.

2. Distinct and separate offenses improperly joined in the same information do not render sentences thereon null and void and entitle the person so sentenced to release on habeas corpus.

Certainly, if the offenses were not separate and distinct, but constituted a single offense, the appellant would be entitled to release on habeas corpus.

Morgan v. Devine, 237 U.S. 632.

On the other hand, appellant seeks release on the grounds as stated in the "Summary" to his brief:

"As the bill of information shows, the appellant has been subjected to a practice which has been

> ruled by the Supreme Court as illegal, inasmuch as there were two separate and distinct charges entered on one bill of information, and two separate and distinct sentences given to run consecutively."

While there may be contentions as to what constitutes separate and distinct offenses, the principle that a person sentenced on an information as above described cannot be released on habeas corpus on the ground that distinct offenses were improperly joined, still stands uncontested.

Ex parte *Peters*, 12 Fed. 461.

And it has been held:

> "That an indictment charged more than one offense, in violation of the laws of the territory where petitioner was convicted, was a mere error of procedure, which did not divest the trial court of its power to render judgment, and was therefore, not ground for petitioner's discharge on habeas corpus."

Connella v. Haskell, 158 Fed. 285, 288.

CONCLUSION

For the foregoing reasons, it must be contended that the decision below should be affirmed.

Respectfully submitted,

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Attorneys for Appellee.